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CITATIONS

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1945

ROSE MARY HASH, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE.

G. LESTER HASH, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Oppie L. Hedrick, on behalf of Rose Mary Hash and G. Lester Hash, hereby prays that Writs of Certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above causes on December 31, 1945, affirming the decisions of the Tax Court of the United States.

OPINIONS BELOW

The opinion of the Tax Court (R. 165-198) has been reported at 4 T. C. 878. The opinion of the Circuit Court of Appeals (R. 202-209) has been reported at 152 F. (2d) 722.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on December 31, 1945. (R. 209-210, 212). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936.

QUESTIONS PRESENTED

The Petitioners by concurrent declarations of trust, dated September 1, 1940, and May 1, 1941, assigned to their spouse and an attorney as co-trustees interests in two businesses owned by them as equal partners. The assignments were for the benefit of the petitioners' daughters and other specifically named beneficiaries. Simultaneously partnership agreements were entered into with the trustees for the continued operation of the businesses. The income of the trusts is to be currently distributed or to be accumulated in the discretion of the trustees, but corpus and accumulated income are ultimately distributable only to the specifically named beneficiaries. Neither the Petitioners nor the Trustees have any power of revocation nor any power to change either the beneficiaries or their distributive shares. The Petitioners have only a very remotely contingent reversionary interest if both daughters should die and neither one had any issue.

Are the rights retained by the Petitioners in the properties transferred so many, so material and substantial as to render them liable for taxes on the income from the trusteed properties under Sec. 22(a) of the Internal Revenue Code as construed by this Court in *Helvering* v. *Clifford,* 309 U. S. 331?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, infra, PP. 15-25.

STATEMENT

The material facts as shown by the record may be summarized as follows:

The Petitioners are husband and wife (R. 168.) They have two daughters, Rosemary, born in 1924, and Doris June, born in 1926 (R.170). For several years prior to 1940 the Petitioners discussed among themselves the desirability of making some provisions for these daughters (R. 115, 116, 138)). They finally decided upon the creation of separate estates for them. These estates were to be managed for the benefit of the daughters until they could successfully manage their own affairs. In view of the substantial rights vesting in the beneficiaries, the estates should be sufficiently protected against squandering by the daughters themselves, either alone or in conjunction with their prospective husbands.

The principal holdings of the Petitioners were two flourishing businesses, The Hash Furniture Company and The National Finance Company, owned and operated by the Petitioners as equal partners. (R. 101, 135). Of these holdings each one of the Petitioners assigned irrevocably into trust for the benefit of one daughter one-half of his own holdings or one-fourth of their total holdings.

These assignments were made by declarations of trust, dated September 1, 1940, as to the National Finance Company (R. 63-69, 171-177). The assignments as to the Hash Furniture Company were made

by declarations of trust, dated May 1, 1941 (R. 69-77, 77-84). The first trusts were named after the beneficiaries, the second ones after the grantors.

Immediately after each one of the assignments, the Petitioners entered into partnership agreements with the trustees for the continued operation of the businesses. (R. 85-95, 178-186). Each Petitioner appointed as trustees his spouse and a local attorney, requiring unanimous action on their part and providing for settlement of any disputes between them by the local court.

The primary beneficiary of the trusts created by the father is the oldest daughter, Rosemary; the primary beneficiary of the trusts created by the mother is the youngest daughter, Doris June.

The provisions of the separate and irrevocable declarations of trust are essentially as follows: That the daughter shall be the beneficiary both as to corpus and income for the term of her life; that the trustees shall currently distribute to her from either corpus or income such amounts as may be necessary for her maintenance and support, but not for the purpose of discharging any legal obligation of either grantor to furnish such support; that the trustees may terminate the trust and turn over to the beneficiary the corpus and any accumulated income whenever they deem her capable of managing the properties herself; that in the event of the daughter's death prior to termination, her children, if any, shall be next in line; that in the event both daughters died without issue, the trusts should then terminate and the corpus and any accumulated income should go to the grantor's spouse, if living.

In view of the authority given the trustees to ter-

minate the trust at any time, the terms of the trusts were set as long as the rules against perpetuities permitted, except in the event that both daughters died without issue.

To protect the trust estates against alienation, permitted by local law and not prohibited by the instruments, more successfully than it could be done by the discretion of the trustees as to distributions alone, the grantors provided, as an ultimate resort, for the removal of a beneficiary who has proven herself or himself "grossly unworthy". The authority to remove was given to the local court in the second instruments. In the first instruments the authority to remove was originally given to the trustees, but upon application of the grantors the local court took upon itself this power and by decree (R. 58-63) retroactively changed the provisions in the first instruments to conform to those made in the second ones. The succession in case of removal is the same as that provided in case of death.

The trustees were currently credited with their distributive share of partnership profits. (R. 97-98). None of these profits were withdrawn except those necessary to pay income taxes of the trusts. The trustees made no distributions to the beneficiaries who were supported, as before, by their parents from their individual funds.

The businesses continued under the exclusive management of the husband while the wife contributed her full time personal services as before.

The declarations of trust and the partnership agreements were recorded with the Cierk of Raleigh County, West Virginia, and the financial statements of the businesses revealed the change in ownership. Gift tax returns were filed and the gift taxes paid.

The Tax Court found as a fact (R. 197-198) that neither trusts nor partnerships lacked substance or validity, but in its opinion (R. 165-198) concluded, on the basis of numerous inferences drawn from the record, that nothing but legal title was transferred to the trusts, that the grantors could have the beneficiaries changed in a manner which could result in their respective recovery of legal title, that the grantors had a significant reversionary interest and that thus the Petitioners retained such a "bundle of rights" in the corpora of the trusts as to constitute them the substantial owners thereof and taxable on the income therefrom under Sec. 22 (a) of the Code, as construed in *Helvering* vs. *Clifford, supra.*

The Circuit Court of Appeals affirmed the Tax Court by a two to one decision, because the majority believed, that the overall picture gleaned from the record furnished ample support for the inferences drawn by the Tax Court; the majority did not feel justified in holding against these findings of the Tax Court, that the powers lodged in the taxpayers were primarly bottomed in the interests of the beneficiaries, or that the taxpayers divested themselves of all economic benefit or interest in the trust estate or the income therefrom.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the inferences drawn by the Tax Court have substantial support in the record.

(2) In failing to hold that the powers of the trustees are exercisable in the interest of the beneficiaries only.

(3) In failing to hold that the Petitioners have divested themselves of all economic benefit or interest in the trust estate or the income therefrom.

(4) In holding that the Petitioners remained in substance the owners of the corpora of the trusts.

(5) In holding that the income of the trusts is taxable to the Petitioners under Sec. 22 (a) of the Internal Revenue Code.

(6) In affirming the decisions of the Tax Court.

REASONS FOR GRANTING THE WRITS OF CERTIORARI

The reasons for granting the writs in these causes are manifold.

I

THE DECISIONS HERE BELOW ARE IN OPEN CONFLICT WITH VITAL PRINCIPLES APPLIED BY OTHER CIRCUIT COURTS OF APPEALS IN DECISIONS INVOLVING LONG-TERM IRREVOCABLE TRUSTS

The dissenting opinion of Judge Coleman (R. 208-209) with the decisions here below points out a direct conflict with *Armstrong* v. *Commissioner*, 143 F. (2d) 700, which was decided by the Tenth Circuit in favor of the taxpayer on a weaker set of facts that those here involved. The facts here are more akin to those in the *Armstrong* case than to those in *Losh* v. *Commissioner*, 145 F. (2d) 456, which was followed by the majority, despite its conviction, that the present cases are closer to the "dividing line" than the *Losh* case.

This direct conflict becomes more evident yet when vital principles applied by other circuits are compared with the reasoning in the decisions here below.

In *Jones* vs. *Norris*, 122 F. (2d) 6, the Tenth Circuit held that in the absence of powers to revoke or revest, and without a substantial reversionary interest, there could not be sufficient incidents and attributes of ownership to hold the grantor taxable under Sec. 22(a). Absent these same elements, the contrary conclusion was reached below in the present cases.

In *Commissioner* vs. *Branch*, 114 F. (2d) 985, the First Circuit held that a remote reversionary interest does not render the grantor taxable, even if he is trustee with broad powers of management. In the present cases a very remotely contingent reversionary interest was called significant and used to justify taxation to the Petitioners who were neither direct nor sole trustees.

In *Phipps* vs. *Commissioner*, 137 F. (2d) 141, the Second Circuit held that control over the trust within the *Clifford* doctrine could not be based on an assumed disregard of the grantor for the purposes of the trust. The Tenth Circuit, in *Hall* vs. *Commissioner*, 150 F. (2d) 304, held that the proper exercise of a trustee's powers in the interest of the beneficiaries must be presumed. In the present cases, the inferences drawn by the Tax Court and adopted by the Fourth Circuit, are largely based on speculative possibilities that the Petitioners might disregard their duties as trustees and might exercise their powers as trustees for their own selfish benefit.

The duration of the trusts was greatly stressed

by the Tenth Circuit in *Commissioner* vs. *Armour*, 125 F. (2d) 467, and *Commissioner* vs. *Katz*, 139 F. (2d) 107. In the decisions here below the long-term nature of the trusts was entirely ignored.

The Tenth Circuit in *Commissioner* vs. *Buck*, 120 F. (2d) 775, established the requirement of a very substantial measure of control and express reservations of substantial rights to make the *Clifford* doctrine applicable to long-term trusts, a measure of control not necessarily required in a short-term trust. In the present cases, control over long-term trusts was assumed although no express reservations of substantial rights were found or pointed out. The majority opinion, failing to elaborate on the *seratim* treatment of rights, merely admonishes us of their summation, "however slight may be each individual retained right."

In *Jones* vs. *Norris, supra,* the powers of management were discounted because under the terms of the trust both corpus and income were distributable to the beneficiares in person on termination or sooner in the discretion of the grantor. Under identical circumstances undue stress was placed in the present cases not only on the management of the trusts, but likewise on the management of partnerships held othwise substantial and valid. In *Commissioner* vs. *Betts*, 123 F. (2d) 537, the Seventh Circuit at least paid respect to the business ability of the grantor in viewing his investment powers, while in the present cases much ado is being made over the inexperience of an attorney-trustee in the businesses which he is not even expected to manage.

The conflicts herein above set out are submitted as illustrative, but by no means exhaustive.

II

THE DECISIONS BELOW ARE PROBABLY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

The dissenting opinion of Judge Coleman indicates a probable conflict of the decisions here below with the decision of this Court in *Helvering* vs. *Clifford, supra.* To use the language employed in the minority opinion (R. 208):

> "The opinion in *Helvering* v. *Clifford,* 309 U. S. 331, broad as is its language, should not, I feel, be construed as sweeping into its fold such a situation as that before us."

Later we read again (R. 209):

> "I do not believe that *Helvering* v. *Clifford, supra,* or any decision yet rendered by the Supreme Court, requires us to go this far."

The probability of a conflict between the decisions here below and this Court is further enhanced by the interpretations given the *Clifford* case by other circuits in conflict with the Fourth Circuit as previously set forth in this petition.

The relative weight given by this Court in the *Clifford* case to the term of the trust and the extent of control over the principal appears obviously unbalanced in the decisions here below. It seems that the control over the principal assumed by this Court in the *Clifford* case is largely based, not upon the management powers alone, but upon these powers in conjunction with an absolute reversion of the principal

after a short interim period. Only such combination could produce as its result what this Court called "a temporary reallocation of income." Without such absolute reversion of the principal, the management powers seem of a lesser consequence and the control over the principal becomes sufficiently diluted, particularly in a long-term trust, as not to bring any such case within the orbit of the *Clifford* doctrine.

The probability of a conflict also exists as to this Court's decision in *Helvering* vs. *Stuart,* 317 U. S. 154. The distinction drawn in that case by this Court between economic gain realized or realizable and non-material satisfactions is completely lost in the decisions here below. These decisions do not point out any economic gain realizable by the Petitioners, and on the basis of the record it is hard to see, how any single economic benefit could have been pointed out. Certainly, the mere fact that the profits of the trusts remained in the businesses cannot be used as a basis for assuming economic gain realizable by the Petitioners. Such basis would not only be too weak, but would obviously be in conflict with accepted principles of law which taxes partners on their distributive share of profits, whether distributed or not.

In saying so, we are mindful of this Court's statement in the *Stuart* case, *supra,* at page 168:

> "That economic gain for the taxable year, as distinguished from non-material satisfactions, may be obtained through a control of a trust so complete that it must be said the taxpayer is the owner of its income."

But the improbability, though not absolute impossibility of reversion, the fact that corpus and accumulated income of either partnerships or trusts are ul-

timately distributable only to the specifically named beneficiaries strongly point in the other direction and to a probable conflict of the decisions below with the applicable decisions of this Court.

III

THE IMPORTANCE OF THE QUESTION INVOLVED CALLS FOR THE VIEWS OF THIS COURT IN THE INTEREST OF A MORE STABLE JURISDICTION AND TAX ADMINISTRATION

Flushed by his victory in the *Clifford* case, the Commissioner immediately embarked upon a vigorous campaign designed to practically exterminate for tax purposes all trusts. These tendencies were early recognized by the First Circuit and referred to in *Commissioner* v. *Branch, supra,* with these words at page 986:

> ". . . . we are asked to press on beyond *Helvering* v. *Clifford,* 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788, and to apply the rationale of that striking case to a much weaker set of facts."

These attempts at an apparently unwarranted expansion of the *Clifford* doctrine have created considable confusion and started a flood of litigation. Eminent authorities in the field of Federal Income Taxation became alarmed over the results. We like to refer to an article by Roswell Magill, published, concurrently with the Columbia Law Review, in Taxes, The Tax Magazine, Vol. 23, No. 4, April 1945, and the authorities cited therein.

This confusion has reached deep down, as the vigorous dissent of Judge Coleman with the decisions

below amply illustrates. It is not limited to the Fourth Circuit either.[1])

In *Commissioner v. Bateman,* 127 F. (2d) 266, the First Circuit admits to it by saying, at page 271:

> "Frankly, we do not know how the Supreme Court would apply the general criteria of the Clifford case to the facts now befor us."

In *Suhr* v. *Commissioner,* 126 F. (2d) 283, the Sixth Circuit expresses itself as follows at page 287:

> ". . . . our trouble arises from the fact that precise standards or guides not only are absent from the statute or appropriate regulations but that the Court, in its effort to supply the omission, has found itself likewise unable to give us definite charts of the road to judgment. . . ."

We feel that this Court is in a position to furnish us more definite standards as to the rationale of the *Clifford* case and that the time for an amplification of its views has come. More than six years have expired since this Court has authoritatively spoken on the subject. In those years many principles have reached the crystalization stage in the conflicting decisions of the lower courts. The authority of this Court could now put to rest the unending controversy, thus stabilizing the jurisdiction of the lower courts and stopping the flood of litigation.

This task should not be left to the Commissioner who has just recently assumed it by issuing new regulations. (Reg. 111, Sec. 29, 22 (a)-21, as added by

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1) It is admitted by the Commissioner himself in his regulations, referred to below. (Appendix, Page 16).

T. D. 5488, Dec. 29, 1945, R. 15ff). These regulations are in sharp contrast to the administrative practices up to now, despite the professed intention of applying them to taxable years beginning prior to January 1, 1946. They clearly reveal and admit the attempt of the Commissioner to settle the controversy over the *Clifford* doctrine on his part ,thereby assuming a function which is within the province of this Court.

CONCLUSION

Wherefore it is prayed that this petition for Writs of Certiorari be granted.

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March 1946